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Supreme Court of the United States

OCTOBER TERM, 1951

No. 225

PORTO RICO TELEPHONE COMPANY,
Petitioner,

against

PUERTO RICO COMMUNICATIONS AUTHORITY,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT.

JOHN W. DAVIS,
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Attorneys for Petitioner.

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT.

Porto Rico Telephone Company, plaintiff in the above-entitled action, respectfully prays the issuance of a writ of certiorari to the United States Court of Appeals for the First Circuit to review a judgment of that Court rendered herein May 8, 1951 (R. 711).

Opinions Below

The opinion of the District Court (R. 668-674) is reported in 89 F. Supp. 922. The opinion of the Court of Appeals (R. 701-711) is reported in 189 F.2d 39.

Jurisdictional Statement

The jurisdiction of this Court is invoked under §§ 1254 (1) and 2101(c) of the United States Code, Judiciary and Judicial Procedure.

The judgment herein of the United States Court of Appeals for the First Circuit was filed on May 8, 1951 (R. 711). On June 7, 1951, the mandate of the Court of Appeals was stayed until its further order, pending this application for a writ of certiorari.

This application is made pursuant to Rule 38, par. 5, subd. (b) of the Rules of this Court on the grounds that the Court of Appeals below has rendered a decision in conflict with decisions of the Courts of Appeals of other circuits on the same subject matter and in probable conflict with applicable decisions of this Court and that the Court of Appeals below has decided important questions of federal law with regard to which review should be granted by this Court in the exercise of sound judicial discretion.

Statement of Matter Involved

This action was instituted by petitioner (hereinafter referred to as "the plaintiff") in the United States District Court for the District of Puerto Rico to enjoin the threatened and plainly illegal seizure and condemnation by the respondent, Puerto Rico Communications Authority (hereinafter referred to as "the defendant") of a substantial section of the telephone system of the plaintiff. The action as originally instituted was also against certain governmental officials serving as directors of the defendant. On their resignations the action was not continued against their successors, but solely against the defendant Puerto Rico Communications Authority.

The intent on the part of the defendant both to condemn, and to seize "immediate possession" at the outset of the proceedings, stand admitted on the pleadings (R. 3, 31-32; Opinion of the Court of Appeals, 701).

Federal jurisdiction in the instant case was invoked both on the ground of diversity of citizenship (the plaintiff is a Delaware and the defendant, a Puerto Rican corporation) and the presence of federal questions (R. 2, 148).

Plaintiff was immediately granted a restraining order (R. 30-31) and later an injunction *pendente lite* (R. 36-37). On the day following the order for injunction *pendente lite,* the trial of the action was referred to a Special Master (R. 40-41) who filed his report on January 5, 1948. In this report (R. 41-154), the Special Master specifically found that the threatened seizure of immediate possession and the occupation of this section of plaintiff's integrated telephone system would cause irreparable injury which could not be measured or compensated in monetary damages if the seizure and condemnation were ultimately determined to be illegal. And the report held, as a matter of law, that the seizure and condemnation would be illegal and recommended that a permanent injunction should issue.

Shortly thereafter plaintiff moved for a confirmation of the Special Master's report (R. 651), but *not until April 22, 1950,* did the District Court (Honorable David Chavez, Jr., Judge) render its decision. Then, ignoring plaintiff's motion to confirm the Master's findings of irreparable injury as well as his holding that the seizure and condemnation would be illegal, Judge Chavez filed an opinion (R. 668-674, reported in 89 F. Supp. 922), holding that the complaint failed to state a cause of action in equity in that plaintiff could present in the condemnation proceeding itself the illegalities it was claiming with respect to the threatened seizure and condemnation and that therefore plaintiff had an adequate remedy at law and no *equitable* jurisdiction existed. Thereafter judgment of dismissal was entered (R. 674).

This petition seeks review of a decision by the Court of Appeals for the First Circuit (R. 701-711, reported in 189 F.2d 39), which affirmed the judgment of the District Court. In holding, as the Court of Appeals did, that plaintiff would have opportunity to be heard on the illegality of this threatened seizure and condemnation before it is ordered to part with possession of the telephones, wires and exchanges comprising this segment of plaintiff's system (and thus prevent the irreparable injury which would otherwise result), the Court of Appeals rendered a decision which is directly in conflict with a decision of the Court of Appeals for the Ninth Circuit[1], with the underlying principle of this Court's decisions in *United States* v. *Miller,* 317 U. S. 369, at page 381, and *Catlin* v. *United States,* 324 U. S. 229, at page 231, and with a prerequisite to a decision by the Court of Appeals for the Fifth Circuit.[2]

A fundamental premise of those decisions was that the condemning party under a statute with procedure identical to that at bar[3] had an "immediate right of possession" to the property being condemned, which right

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[1]*City of Oakland* v. *United States,* 124 F.2d 959.

[2]*Dade County, Fla.* v. *United States,* 142 F.2d 230.

[3]The Court of Appeals for the First Circuit in the case at bar said (R. 703):

> "We turn, therefore, to consider the Eminent Domain Act, as amended. Section 5(a) of the Act is set out in a footnote.[8] This section which was originally added to the Eminent Domain Act by § 2 of Act No. 2 of April 1, 1941, Laws of Puerto Rico 1941, p. 286 is almost a *literal copy* of the Act of Congress of February 26, 1931, 46 Stat. 1421, 40 U. S. C. A. §§ 258a et seq.[9] The Supreme Court of Puerto Rico has accordingly held that it is to be similarly construed.[10]"

The statute is set out in full in footnote 8 at R. 703 *et seq.*

could be exercised by *ex parte* order of the Court, directing surrender of possession.

The decision of the Court of Appeals below that plaintiff has the opportunity to present the illegality of the taking, before it is ordered to part with possession of its property, or, in other words, that the condemnor *cannot* obtain an order of possession on *ex parte* application not only concerns all federal condemnations (because up to the present decision the right to take possession by *ex parte* order has been so universally accepted), but is decisive of the case at bar. To demonstrate that this is the question, as the Court below saw it, we quote from its opinion (R. 703):

> "If in that proceeding [i.e., the condemnation proceeding] the Telephone Company will be afforded an adequate opportunity to have the legality of the condemnation and seizure of its property determined *before it is required to part with possession of it,* the judgment of the district court, which was based upon the conclusion that such a remedy was afforded by the laws of Puerto Rico, must be affirmed."[4]

The property involved in the case at bar is not mere realty with tangible improvements, nor indeed is it a single power plant of a public utility; on the contrary, it is *a part,* and only a part, of a telephone system which has been built up and operated over the years as an integrated system by Porto Rico Telephone Company pursuant to a franchise granted by the Executive Council of Puerto Rico on May 25, 1914 (R. 3, 31, 44-5) which does not expire until 1964 (R. 26). The system comprises 62 central office exchanges,

[4]All emphasis in quotations in this petition has been supplied, unless otherwise noted.

serving 22,000 telephones in the Island of Puerto Rico all interconnected by some 7,000 miles of wire, the largest exchange being that of San Juan serving some 12,000 telephones (R. 44).

The service, operation and rates of this entire system are subject to the supervision and control of the Public Service Commission of Puerto Rico (R. 44).

The defendant Communications Authority, which operates a very small system consisting of 1100 stations, was called into being by the Communications Authority Act of 1942 as a corporation "having legal existence and personality separate and apart from that of the government" of Puerto Rico (R. 45).

By its answer herein the defendant Authority boldly admitted that it was about to file condemnation proceedings under the General Expropriation Law of Puerto Rico against some 17 central office exchanges and 3400 telephones of the plaintiff and that it (the Communications Authority) proposed *"to seize and take immediate possession* of a portion of the telephone system and properties of the plaintiff" in order to operate any such portion taken as part of the telephone system owned and operated by the Puerto Rico Communications Authority (R. 3, 31-32). Indicating the substantial nature of the damage that would be thus incurred is the fact that the gross revenues for one year from the portion of the system threatened to be taken were $268,162 (R. 175).

There was uncontradicted testimony of two witnesses that it was the intention of the Communications Authority, after acquiring this section of the plaintiff's system, to move on and thereafter acquire by this piecemeal procedure other sections of plaintiff's system until the entire property was

obtained (R. 47, 289, 298). Less than two years before this threat was made, the Legislature of Puerto Rico declined to acquire the entire system of plaintiff for the Government at a figure fixed by a board of appraisal on which the Government was represented (R. 45-46).

Since the condemning party here, the defendant Communications Authority, is not the Government of Puerto Rico, but merely "is a corporation having legal existence and personality separate and apart from that of the government" of Puerto Rico (R. 45), the same situation is presented here as if the Reading Railroad were about to condemn a section of the Pennsylvania Railroad, looking to the ultimate acquisition of that entire system by such a chaotic and piecemeal process.

The plaintiff, therefore, is faced with this problem. The defendant Communications Authority can institute a condemnation proceeding in the Insular Court of Puerto Rico, thereupon obtain an *ex parte* order directing plaintiff to surrender "immediate possession" of these 17 exchanges and 3400 telephones (assuming the condemning court elects to follow the practice approved by this Court in the *Miller* and *Catlin* cases, rather than the views of the Court of Appeals in the present case), and then plaintiff is left with its system, torn apart, until the entire condemnation, including the difficult, indeed in this case impossible, task of ascertaining damages, is completed.

Even if the condemning court in this case should afford some opportunity of permitting the plaintiff to raise the legality of the order directing surrender of possession (e.g. by affording time for a motion to vacate), plaintiff is still faced with the situation that such an order, erroneously entered and erroneously adhered to, cannot be appealed from

(under this Court's holding in the *Catlin* case) until the entire proceeding in the condemnation case has been completed. It was this very period of occupation, with the cutting out of these 17 exchanges and 3,400 telephones which the Special Master found would cause injury for which monetary damages would be inadequate (R. 148-149). It is of paramount importance that neither the District Court nor the Court of Appeals raised any question as to this finding of the Special Master.

That the condemnation and taking of possession by the defendant, Communications Authority, would ultimately be declared illegal, there can be no doubt. In the first place, both Section 2 of the Organic Act of March 2, 1917, 39 Stat. 951, 48 U. S. C. A. § 737 and Section 10 of the Communications Authority Act of Puerto Rico of May 12, 1942, enjoin the Communications Authority from taking any action which shall have the effect of impairing the obligation of any contractual duties imposed upon or assumed by The People (or Government) of Puerto Rico under authority of existing law. The threatened seizure clearly violates these acts, for it not only impairs, it destroys plaintiff's right under its franchise to furnish telephone service until 1964 through the facilities involved, to the areas concerned. (Of course, the Communications Authority is not in the position of a sovereign government with such powers as it might have to terminate or condemn franchises; indeed, Section 10 of the Communications Authority Act, just referred to, specifically deprives it of any such power with respect to a franchise agreement.)

The condemnation would further violate the franchise in that the franchise, granted in 1914 by the Executive Council of Puerto Rico under authority of Congressional enact-

ment, affords the sole and exclusive process whereby the properties of the plaintiff may be taken, and it (the franchise) provides expressly (Section 20; R. 21) that if any of the properties are taken, *"all of the properties"* shall be so taken. The tearing out of a segment of this system as defendant admittedly intends to do would violate this provision.

Where, as in the case at bar, there is an admitted threat to cause irreparable injury to property through an unauthorized or illegal condemnation, the remedy of injunction is recognized as appropriate relief. *Osborne* v. *Missouri Pacific Railway,* 147 U. S. 248, at pages 258-9; *State Highway Department* v. *H. G. Hastings Company,* 58 Ga. 204, 199 S. E. 793; *Lone Star Gas Co.* v. *City of Ft. Worth,* 128 Tex. 392, 98 S. W. 2d 799.

Questions Presented

1. Whether, under § 5(a) of the General Expropriation Act of Puerto Rico of March 12, 1903, as amended, and the identical procedure of the federal statute, Act of Congress, of February 26, 1931, 46 Stat. 1421, 40 U. S. C. A., §§ 258(a) *et seq.,* a condemnor is required to give notice of an application for an order directing the condemnee to surrender possession or is permitted to obtain such an order on *ex parte* application to a court and without any opportunity to the condemnee to be heard prior to the making of such an order.

2. Whether, assuming that a condemnor can obtain *ex parte* an order directing the condemnee to surrender possession of the property and that surrender of possession

in obedience to the order would inflict irreparable injury upon the condemnee, the right of the condemnee after the entry of such order to raise in the condemnation proceeding itself the illegality of the condemnation and of the taking of possession affords a full, adequate and complete remedy at law defeating equitable jurisdiction.

3. Whether, assuming a condemnee is entitled to be heard in opposition to an order directing it to surrender possession of its properties, the absence of a right to appeal from such an order until the final determination of the condemnation proceeding (*Catlin* v. *United States,* 324 U. S. 229), deprives the condemnee of a full, adequate and complete remedy at law, where irreparable injury will result from the interim occupation of the properties involved.

4. Whether a condemnation which will deprive a condemnee of the right to furnish telephone service pursuant to a franchise agreement effective until 1964 impairs the obligation of that agreement in violation of the Act of Congress of March 2, 1917, § 2 (48 U. S. C. A., § 737), imposing on the Government of Puerto Rico the same restriction as is imposed on states requiring that no law impairing the obligation of contracts shall be enacted.

5. Whether, by provisions generally granting to a corporation a right of condemnation (Communications Authority Act of Puerto Rico of May 12, 1942, § 6), the territorial government of Puerto Rico attempted to revoke provisions in franchises previously granted to public utility corporations, pursuant to direction of Congress (48 U. S. C. A., §§ 750 and 752), specifying the mode and

conditions in which their properties should be acquired by the government of Puerto Rico.

6. Whether, assuming the answer to question 5 to be in the affirmative, such attempted revocation is in violation of the Organic Acts by which Congress delegated and limited the authority of the government of Puerto Rico.

7. Whether a corporation organized under an act expressly depriving the corporation of authority to pledge the credit of the government or the people (as done by subdivision (t) of § 6 of the Communications Authority Act of Puerto Rico of May 12, 1942) may legally undertake any proceedings the effect of which is to pledge the credit of the government or the people pursuant to Section 5(a) of the General Expropriation Act of Puerto Rico of March 12, 1903 as amended or Sections 258(a) *et seq.* of Title 40 of the U. S. Code.

Statutes Involved

The statutes which give rise to these questions are:

Joint Resolution No. 23 of Congress, May 1, 1900, 31 Stat. 716;

Organic Act of April 12, 1900, § 32, 31 Stat. 84;

Organic Act of March 2, 1917, §§ 2, 38 and 39 (48 U. S. C. A. §§ 737, 750 and 752), and 39 Stat. 951, *et seq.;*

Act of Congress of February 26, 1931, 46 Stat. 1421, 40 U. S. C. A. §§ 258(a), *et seq.;*

General Expropriation Act of Puerto Rico of March 12, 1903, as amended;

Communications Authority Act of Puerto Rico of May 12, 1942;

Constitution (U. S.), Fifth Amendment.

Reasons for Granting the Writ

1. The decision of the Court of Appeals in the instant case and its dictum in the case of *Puerto Rico Ry. Light & Power Co.* v. *United States,* 131 F.2d 491, 494, n.3, upon the authority of which the instant case was decided, are directly in conflict with the decisions of the Courts of Appeals for the Ninth[5] and Fifth[6] Circuits and in probable conflict with the decisions of this Court[7] affecting the procedure in condemnation proceedings for obtaining an order directing surrender of possession of the condemned property.

The sole basis for the opinion of the Court of Appeals that the District Court correctly held that it was without jurisdiction to grant relief in equity was the holding of the Court of Appeals (on the authority of its own prior dictum) that appellant could not be compelled to surrender possession of its properties in the threatened condemnation proceedings until after notice and an opportunity therein to urge the illegality of such proceedings and that, therefore, appellant had a full, adequate and complete remedy at law.

In so doing the Court of Appeals construed Section 5(a) of the General Expropriation Act of Puerto Rico of March 12, 1903, as amended, as requiring a condemnor to give notice to a condemnee of any application for an order requiring the condemnee to surrender possession of the condemned property (R. 707). And this construction was adopted by the Court below after express recognition that:

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[5]*City of Oakland* v. *United States,* 124 F.2d 959, 964.

[6]*Dade County, Fla.* v. *United States,* 142 F.2d 230.

[7]*Catlin* v. *United States,* 324 U. S. 229, 231; *United States* v. *Miller,* 317 U. S. 369, 381.

> "This section * * * is almost a literal copy of the Act of Congress of February 26, 1931, 46 Stat. 1421, 40 U. S. C. A. §§ 258a et seq." (R. 705-6; 189 F.2d 43),

that:

> "The Supreme Court of Puerto Rico has accordingly held that it is to be similarly construed." (R. 706; 189 F.2d 43),

and that:

> "The procedure under Section 5(a) of the Eminent Domain Act is identical to that under the Federal Act."

But the construction given this statute by the Court below is in absolute contradiction of the construction of 40 U. S. C. A. §§ 258a *et seq.* by the Courts of Appeals for the Ninth[8] and Fifth[9] Circuits, which have held that an order, directing surrender of possession by the condemnee, may be granted thereunder on *ex parte* application of the condemnor upon the filing of petition and declaration and without any prior notice or opportunity to be heard to the condemnee.

In *City of Oakland* v. *United States,* 124 F.2d 959, 964, the Court of Appeals for the Ninth Circuit affirmed just such an *ex parte* order directing surrender of possession within thirty days over the objections of the appellant based on want of prior notice and opportunity to be heard.

Moreover, *ex parte* procedure directing surrender of *immediate* possession has the implicit sanction of this and other Courts, including the Court of Appeals for the First

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[8]*City of Oakland* v. *United States,* 124 F.2d 959, 964.

[9]*Dade County, Fla.* v. *United States,* 142 F.2d 230.

Circuit.[10] In the *Miller* case this Court said that one of the purposes of the statute is "to give the Government *immediate* possession of the property". 317 U. S. 381. In the *Catlin* case this Court noted without comment that the order for *immediate* possession had been entered *ex parte*. 324 U. S. 231. So also did the Court of Appeals for the Fifth Circuit in *Dade Co., Fla.* v. *United States,* 142 F.2d 230.

Showing the general understanding of the federal courts as to the *ex parte* right to possession is the opinion in *United States* v. *Certain Parcels of Land,* 40 F. Supp. 436, 440 (D. C., Md., 1941, per Chesnut, D. J.), in which it was said:

> "The court is also authorized to determine *ex parte* the time within which and the terms upon which the parties in possession shall be required to surrender possession to the government. In view of the national necessities this time is usually made a very short one; * * *."

The directly contradictory position taken by the Court of Appeals for the First Circuit in the case at bar to that generally accepted is shown by the language of the First Circuit at pp. 706-707 of the Record:

> "The procedure under Section 5(a) of the Eminent Domain Act is *identical to that under the Federal Act.* If, upon a petition by the Communications Authority to obtain possession of the property sought to be condemned, the Telephone Company should raise the question of illegality which it has raised

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[10] *Catlin* v. *United States,* 324 U. S. 229; *United States* v. *Miller,* 317 U. S. 369; *Sagastivelza* v. *Puerto Rico Housing Authority,* 171 F.2d 563 at page 564.

> in the present suit *it would be necessary for the court before which the condemnation proceeding was pending to consider those questions* and to decide that they were without merit *before it could make an order directing the Telephone Company to surrender to the Communications Authority possession of the portion of its system sought to be condemned."*

As previously noted, the conflicting construction of the statute by the Court below was based (R. 706) solely upon its own dictum in *Puerto Rico Ry. Light & Power Co.* v. *United States,* 131 F.2d 491, 494, n.3, a case in which its actual decision (that immediate appeal lies from a possession order in condemnation proceedings) was expressly overruled by this Court in the *Catlin* case. 324 U. S. at pages 236 and 243.

The procedure required under the substantially identical provisions of Section 5(a) of the General Expropriation Act of Puerto Rico and Sections 258a *et seq.* of the United States Code is clearly a matter of paramount importance to condemning authorities which this Court should explicitly determine in order to resolve the conflict between the Courts of Appeals which has arisen in the instant case.

2. This case involves a question expressly reserved by this Court for decision when it should be presented in a proper case. In *Catlin* v. *United States,* 324 U. S. 229 at pp. 243-4, this Court said:

> "We have not discussed other issues presented or suggested in the briefs or argument, since that has not been necessary to the disposition of this cause. These include *the question whether, when possession has been taken and damage has been done to the premises in the course of proceedings not authorized,*

> *the remedy by appeal is adequate.* That issue has not been made in this case, * * *. It will be time enough to consider the question concerning adequacy of the appeal or possible existence of other remedy affecting such a case when it arises."

Precisely that question is presented in the instant case. The threatened condemnation is, as the Master in the District Court reported, plainly unauthorized and illegal (R. 51-57). Suit in equity was brought to obtain a remedy adequate to prevent damages found by the Master to be irreparable, because once the order directing possession was made (whether *ex parte* or after opportunity to the plaintiff to oppose), plaintiff could not avoid the damage without finding itself in criminal contempt of court.[11] Its only remedy would lie in appeal. Thus the question is directly presented in this case "whether, when possession has been taken and damage has been done to the premises in the course of proceedings not authorized, the remedy by appeal is adequate". 324 U. S. at page 243.

The Court of Appeals, in determining that the remedy by appeal in the situation at bar would be adequate, did so upon consideration of the remedy by way of appeal available in the insular courts, without proper regard to the inadequate remedy by way of appeal available in the federal courts. (That the plaintiff would have the right, based on diversity of citizenship, to remove any condemnation proceeding to the federal court was clear even to the District Court, R. 672.)

The Court of Appeals went to great pains to point out how plaintiff in the insular courts might through the use of

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[11] *United States* v. *United Mine Workers*, 330 U. S. 258.

a writ of prohibition obtain an immediate appeal from an erroneous order of possession (R. 708-709). At the same time, however, the Court of Appeals at least implicitly recognized that the remedy by way of appeal in the federal courts was not adequate for at page 710 of the record the opinion states:

> "Moreover if the condemnation proceeding should be removed to the United States District Court *appellate review could not be had until the final judgment in the proceeding,*[16] it being doubtful whether this court would have the same power as the Supreme Court of Puerto Rico to issue a writ of prohibition in such a case.[17]
>
> [16]*Catlin* v. *United States,* 1945, 324 U. S. 229.
> [17]See *Wabash R. Co.* v. *Duncan,* 8 Cir. 1948, 170 F.2d 38, cert. den. 336 U. S. 904."

By measuring the adequacy of the remedy at law solely upon the appellate remedies available in the insular courts, the Court of Appeals ignored this Court's decision in *Russell* v. *Todd,* 309 U. S. 280 at page 285, and *DiGiovanni* v. *Camden Fire Ins. Ass'n,* 296 U. S. 64 at page 69, both of which held that the adequacy of the remedy determinative of equitable jurisdiction in the federal court must be measured by the remedy in the federal court and not by the remedy in the state or local court.

Appeal in the federal courts, which must be delayed until long after loss of possession and until the conclusion of the long and tedious proceedings in condemnation are complete, plainly is not such a full, adequate and complete remedy at law as will defeat federal equity jurisdiction to prevent irreparable loss by means of injunction. *Schneider* v. *City of Rochester,* 160 N. Y. 165 at pages 176-177, 54

N. E. 721 at page 724; *Chicago, B. & Q. R. Co.* v. *Chicago, Ft. M. & D. M. Ry. Co.*, 91 Iowa 16, 58 N. W. 918. And this Court should, it is respectfully submitted, grant certiorari to review and determine this question expressly left open in the *Catlin* decision.

Conclusion

For the foregoing reasons, this petition for a writ of certiorari should be granted.

Respectfully submitted,

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Supreme Court of the United States

OCTOBER TERM, 1951.

No. 225

PORTO RICO TELEPHONE COMPANY, *Petitioner*,

Against

PUERTO RICO COMMUNICATIONS AUTHORITY, *Respondent*.

On Petition for Writ of Certiorari to the United States Court of Appeals for the First Circuit.

BRIEF FOR THE RESPONDENT IN OPPOSITION.

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Supreme Court of the United States

OCTOBER TERM, 1951.

No. 225

PORTO RICO TELEPHONE COMPANY, *Petitioner,*

Against

PUERTO RICO COMMUNICATIONS AUTHORITY, *Respondent.*

On Petition for Writ of Certiorari to the United States Court of Appeals for the First Circuit.

BRIEF FOR THE RESPONDENT IN OPPOSITION.

OPINIONS BELOW.

The opinion of the District Court (R. 668-674) is reported in 89 F. Supp. 922. The opinion of the Court of Appeals (R. 701-711) is reported in 189 F. 2d. 39.

JURISDICTIONAL STATEMENT.

The judgment of the United States Court of Appeals for the First Circuit was filed on May 8, 1951 (R. 711). The jurisdiction of this Court is invoked under secs. 1254(1) and 2101(c) of the United States Code, Judiciary and Judicial Procedure (Pet. 1). The application is made pursuant to Rule 38, par. 5, subdivision (b) of the Rules of this Court alleging that the decision rendered by the Court of

Appeals is in conflict with decisions of the Courts of Appeals of other circuits and in probable conflict with applicable decisions of this Court (Pet. 2).

POINTS TO BE RELIED UPON.

The respondents' position is that the threatened condemnation is perfectly legal, that if it is not legal, there is an absence of equity jurisdiction because petitioner has a remedy in the local courts and there are no irreparable damages; that even if there is equitable jurisdiction, this is a case where the Court should not exercise its discretion to grant an injunction; and, finally, that aside from the foregoing, this is not a case in which this Court should exercise its discretion to issue a writ of certiorari.

ARGUMENT.

Point I.

The Condemnation Would Not Be Illegal.

A. The Condemnation Would Not Violate Petitioner's Franchise Or Any Law.

1. The Condemnation would not impair Petitioner's Contractual Rights.

If the injunction prayed for should have been denied for any other reasons, then the judgment of the Court of Appeals should be sustained and therefore certiorari denied.

Petitioner raises the point that the Authority cannot condemn the property for it would be in violation of a contract between the People of Puerto Rico and the company, by which terms the company is entitled to possess and operate the property until 1964. (Franchise, sec. 20, R. 21). Petitioner invokes Section 10 of the Communications Act (212) prohibiting the Authority to do anything that would impair an existing obligation of the People of Puerto Rico.

It should be noted that this section immediately follows Sections 8 and 9, transferring to the Authority the Insular Telegraph and Telephone, owned and operated by the People of Puerto Rico, with all its assets and obligations.

A determination made by the Authority to take the property is a determination made by the Legislature itself. It follows therefore, that in acquiring this property by condemnation, the Authority has no more limitations as regards petitioner's franchise than those limitations that the People of Puerto Rico or the legislature itself might have.

The procedure established in Section 20 of the franchise is applicable in case of a purchase or acquisition under said Section 20. That is, if at any time the People of Puerto Rico notifies plaintiff its intention to make use of the option under the franchise to acquire the property, the rest of the procedure therein established must be followed until the end, and accepted by both parties. But this does not apply in case of acquisition by eminent domain, and the failure of the People of Puerto Rico to purchase the property under Section 20 of the franchise at the end of the last ten year's period (1944) cannot be construed as a waiver, limitation or impairment of the exercise of its sovereign power of eminent domain at any time the People of Puerto Rico elects to so do, without regard to Section 20 of the franchise. Furthermore, the franchise is repealable at will, under its express terms (Sec. 26, R. 26) and under the Organic Act of Puerto Rico.

Any interpretation of Section 20 of the franchise the effect of which would limit the people's right of eminent domain in any other manner than "for just compensation" and for "public utility" can have no support in law. This power belongs at all times to the people, and a legislature cannot even temporarily surrender it. In Nichols, (2d ed.) Vol. I at page 74 we find:

> "The Power of Eminent Domain is Inalienable.
>
> It is an interesting question of constitutional law how far and to what extent a legislature can, by the

statutes which it enacts during the term for which it has been elected, decrease its own powers, so that legislatures subsequently elected will have less authority than their predecessors.

* * * * * * * * *

There is no such exception in the case of eminent domain. The legislature cannot, even by specific enactment, clothe the property of a corporation with exemption from subsequently authorized condemnation. The power of eminent domain is inalienable, and being an essential attribute of sovereignty cannot be even partially bargained away. One legislature cannot tie the hands of its successors or restrict their power to authorize the taking of property for public use when public necessity requires it, and thus prevent the exercise of one of the functions allotted to the legislature by the constitution. By no form of contract or legislative grant can the state surrender its right to take any property within the limits of the state when it may be required for the public use. A statutory provision that the power of eminent domain shall not be exercised in whole or in part is therefore invalid."

In *State of Georgia* v. *City of Chattanooga*, 265 U. S. 472 the Court held that the power of eminent domain, an attribute of sovereignty, cannot be surrendered, and, if attempted to be contracted away, it may be resumed at will. See also *Garrison* v. *City of New York*, 88 U. S. 196.

2. The condemnation of part of petitioner's system does not impair any franchise obligation.

Petitioner argues that under section 20 of its franchise (R. 21) part of its properties cannot be acquired unless all are taken. This argument is based on the erroneous assumption that section 20 provides the only means by which plaintiff's property may be acquired by the People of Puerto Rico or anybody else.

From the text of section 20 it is easy to see that the reference was to a taking or acquisition under the terms of

section 20 itself, and following the procedure fixed therein. There is nothing in the language of section 20 supporting the conclusion that the clause "all the property . . . shall be so taken purchased or acquired" applies to a taking, purchasing or acquisition in any other manner than that described in this section. Besides, any interpretation to the end that the phrase should apply to a taking by eminent domain would make the section void as unconstitutional and as against public policy. A legislature cannot alienate, limit, qualify, obstruct or impair even temporarily, the inherent sovereign power of the people of eminent domain. Nichols (2nd. Ed.) Vol. I, page 75.

3. The communications authority has the power to condemn Petitioner's franchise.

We respectfully submit that the Communications Authority Act clearly gives the Authority the power to condemn franchises. The power to condemn an "undertaking" and the description of an "undertaking" contained in section 2(d) of the Act, which includes a "telephone system" must necessarily include a franchise since, ordinarily, telephone systems operate under a franchise. Besides, the Authority can condemn the property of a telephone system and a franchise is a property although it may not be tangible or may be limited by the terms of the franchise. Section 10 of plaintiff's franchise, itself, recognizes franchises as property (R. 15).

However, we believe this point does not merit more extended discussion. This is so because in no part of plaintiff's complaint is (R. 1-9) there any allegation to the effect that the Authority has threatened or intends to condemn plaintiff's franchise. The allegation clearly refers to physical properties (R. 3) and not to the right to do business, which is the intangible property called a franchise. If the plaintiff had a monopoly, the fact that the Authority would be going into the telephone business in sections cov-

ered by plaintiff's franchise might, perhaps, be considered a taking of that franchise. But we have been unable to find anywhere in plaintiff's franchise a clause giving plaintiff a monopoly on the telephone business in the sections covered by their franchise. As a matter of fact, the last sentence of section 1 of plaintiff's franchise shows that it contemplated the existence of competing telephone systems in any one town (R. 10).

B. The Threatened Condemnation Is Authorized By The General Expropriation Law of Puerto Rico.

Petitioner contended in the courts below that the General Expropriation Law is not applicable to a telephone system because the Act, by its own terms does not mention a telephone system among the kind of property that may be condemned (Sect. 3); and because the general law provides no machinery or procedure to take a telephone system.

Coming to the first contention we believe and have stated before that the substantive right to condemn petitioner's property is not to be looked for in the General Expropriation Act of 1903, but in Act 212 of 1942 where, except for the mentioning of plaintiff's name, the Legislature practically pointed out with its finger plaintiff's property as one that could be expropriated by the Authority—(Act 212, Sec. 6(h); Sec. 2)—if the Authority deemed it necessary and convenient.

In 1903, when Section 3 of the General Expropriation Law was adopted, the legislature enumerated the purposes not the property for which private property could be taken for a public use. Said in a different manner,—the legislature enumerated the public uses. This definition of public purposes was of course, in accord with what in 1903 it was deemed to be the functions and obligations of the state with respect to its citizens. It responded to the then existing interpretation of such constitutional concepts as "public welfare" and "pursuit of happiness". But things have changed considerably, and for the past ten years, this

Court has given new meaning to those old established concepts. Under a new interpretation of what constitutes the people's welfare and the people's happiness, we see the United States in the business of producing and selling electricity, and we see the government engaged in activities of which our learned legislators in 1903 could not dream of.

Keeping pace with these newly established concepts of what may be the functions of the state, sanctioned by the Nation's greatest judicial authority, the Legislature of Puerto Rico has, from time to time modified Section 3 of the General Expropriation Law to introduce additional purposes for which property may be condemned for a public use. Also, the Legislature has adopted separate legislation as Act 212, subjecting specific kind of property to condemnation for public purposes. In this respect, Act 212 and the General Expropriation Act are laws "impari materiae", and supplement each other. One gives the right, the other supplies the procedure. The legislative power that in 1903 defined the public purposes under Section 3 of the General Condemnation Act, is the same legislative power that in 1942 declared the field of communications to be also of public concern.

The second argument made is that the General Expropriation law does not provide the method for valuating the property taken. It is conceded that under Section 5(a) of the General Expropriation Law compensation is provided for, but it is argued that no provision is made showing how property should be valuated as a going concern. If the legislature had done this very thing, any such disposition would have been void and unconstitutional, as an encroachment on the Judiciary. This was long settled in *Monongahela Navigation Co.* v. *United States*, 148 U. S. 312.

In this case Congress authorized the purchase of a certain dam owned and operated by the Monongahela Navigation Co., and appropriated an amount to pay for it. In case the company refused to sell for the amount fixed by Congress, condemnation could be instituted by the United

States, but it was provided in the law that in estimating the sum to be paid as compensation "the franchise to collect tolls" should not be considered. This was rejected and declared void as an undue encroachment on the judicial power, the only one entitled to fix a just compensation. To the same effect: *Sea Board Air Line R. Co.* v. *United States,* 261 U. S. 299.

Point II.

Equitable Jurisdiction To Grant An Injunction Has Not Been Established.

The presence or absence of irreparable damage, the basis for the strong equitable arm of this Court to intervene and enjoin the defendants from filing a law suit in the local courts, must be found and adjudicated independently of any adjudication on the merits of the law suit. The proper application of this principle is of an extraordinary importance in this particular case or else, well known rules laid down by this Court as shown hereinafter, establishing the proper conduct of the court in instances as this, will be completely disregarded. No one will dare to say that plaintiff will suffer irreparable damage from the mere filing by the defendants of a law suit in the courts of Puerto Rico for the condemnation of plaintiff's property, unless any docket fees paid by plaintiff in an appearance will be raised to the category of irreparable damage.

Under the existing local statutes plaintiff's constitutional rights as condemnee can be properly adjudicated in every sense. Plaintiff has an adequate forum and a proper procedure. Section 6 of the General Expropriation Law of Puerto Rico as amended, provides that the final judgment in a condemnation case shall determine, in view of such evidence as shall have been introduced at the trial, whether or not a plaintiff has the right to condemn the property in question or to encumber the same with any easement or servitude, and also the amount that the said

plaintiff shall pay the defendant, and said judgment shall adjudicate the rights of all the parties before the Court. Under Section 9 of said Act a plaintiff condemning property may not take possession of the property condemned if the case has been appealed to the Supreme Court, unless the amount fixed as indemnity is fully deposited with the Court plus an additional bond in the amount of 50% of said indemnity. The judgment entered by a Court of Puerto Rico in a condemnation case is reviewable by the Supreme Court of Puerto Rico with no limitations whatsoever, and the judgment entered by the Supreme Court is reviewable by the Court of Appeals and in the last instance by the Supreme Court of the United States.

It is true that under the applicable local law a condemnor may request possession of the property condemned before final judgment is entered in the condemnation suit, upon the immediate deposit of the amount representing a just compensation for the property taken. For the payment of any difference between this immediate deposit and what it is finally determined by the Courts to be a just compensation, the good faith and credit of the People of Puerto Rico is pledged. The law authorizes the Auditor and the Treasurer of Puerto Rico to pay any such difference from any general funds in the Treasury of Puerto Rico.

But for a condemnor to take immediate possession of the property before final judgment of the case, he must file a petition with the Court and ordinarily the Court enters an order, not without a deposit, vesting title to the property in the condemnor. In cases of real estate this order will amount to practically no more than authority to permit the Registrar of Property to make the necessary recording in his books, for the Court, then, ordinarily fixes a date, with sufficient time and with due notice to the condemnee, in which the condemnor may enter into actual possession and occupancy of the property condemned. The law invests the court with ample discretion in dealing with this matter.

Even in the case of a petition for immediate possession of the property before final judgment, a condemnee enjoys an adequate remedy and procedure in which he may protect his constitutional rights not to be disturbed, and to a just compensation and due process. (Cf. *P. R. Ry. L. & P. Co.* v. *District Court,* 59 P. R. R. 912, where the Supreme Court of Puerto Rico granted a writ of prohibition against a district judge and enjoined the transfer of title and immediate possession on behalf of a condemnor until the condemnee's constitutional rights were fully adjudicated by said Supreme Court.)

Neither the defendants herein, nor the co-defendant Communications Authority in a pending condemnation suit against plaintiff, could ever interfere with, or take physical possession of plaintiff's property even after ordered by the Court without following some practical method or procedure for plaintiff to abandon, and for the defendants to take possession of the property. Property would have to be checked, inventories would have to be made, and the defendants, its servants, employees or other representatives, would have to get hold of the property at the same time plaintiff surrenders it. The case does not call for a symbolical conveyance behind plaintiff's back and without plaintiff's knowledge. We submit that before surrendering its property even upon a petition for immediate possession and control, plaintiff has an adequate remedy and procedure in a condemnation suit to protect its constitutional rights in a full sense. We submit that the record in this case does not support a finding of the existence of irreparable damages independently of the merits of the law suit herein enjoined. We submit finally that a finding of irreparable damage and the lack of an adequate remedy is essential and imperative before the equity arm of this Court may intervene. *State Commission* v. *Wichita,* 290 U. S. 561; *Hawks* v. *Hamill,* 288 U. S. 52; *Lawrence* v. *St. Louis-San Francisco R. Co.* 274 U. S. 588.

On the other hand, and even irrelevant as it was, there is not the slightest showing in Mr. Dominguez' long testimony (R. 159-188), plaintiff's General Manager and star witness, of any irreparable damage accruing to plaintiff. All the effects of the alleged condemnation as stated by Mr. Dominguez such as an increase in the cost of operating plaintiff's Accounting Department; reduction of revenues from the portion severed; an increased cost of maintenance and supervision, or a per telephone increase in the cost of operation of the part not taken, are damages compensable in money, and therefore not irreparable.

One of the worst things Mr. Dominguez said would happen was the abnormal situation created with calls and messages originating and ending in plaintiff's territory having to pass through intermediate territory served by the Authority or vice versa. According to the witness, this would be very unfortunate and disturbing. Yet, the evidence shows that at present calls and messages originating in plaintiff's territory are transmitted through the territory now served by the Authority, and vice versa, with relative facility and expediency. All is needed is just a little additional accounting to keep record of such calls and charge the other utility for the service rendered.

The damages suffered, if the taking is found to be illegal, would be at the most, perhaps a little difficult to ascertain but they would not be unascertainable or impossible to compensate by money damages.

Point III.

Even If There Is Equitable Jurisdiction This Is Not A Case Where The Court Should Exercise Its Discretion To Grant An Injunction.

In *Railroad Commission* v. *Pullman Co.*, 312 U. S. 496, decided March 3, 1941, a three-judge Federal court in Texas enjoined the enforcement of an order of the Railroad Commission of that State. The order prohibited the operation

of sleeping cars unless such cars were continuously in charge of an employee with the rank and position of Pullcan conductor. The order had been assailed as unauthorized by the Texas law and also as violating the Equal Protection, the Due Process, and the Commerce Clauses of the Constitution. It was also assailed as violating the 14th Amendment in that it discriminated against colored employees.

After stating for the Court that the complaint undoubtedly tendered a substantial constitutional issue and touched a sensitive area of social policy; that the Commission found justification for its order in a Texas statute which prevented unjust discrimination; that whether arrangements pertinent to the staff of Pullman cars fall within the Texas concept of "Discrimination" was far from clear; that since the judges who granted the injunction were trained and experienced in the Texas law the Supreme Court would hesitate to reject their judgment on the matter.

Upon the above considerations of policy the Supreme Court reversed and remanded the case to the District Court with directions to retain the bill pending a determination of proceedings to be brought with reasonable promptness in the State court.

> Cf. *Beal* v. *Missouri Pacific R. Co.*, 312 U. S. 45, decided January 20, 1941, where the possibility of a multiplicity of prosecutions was held to constitute irreparable damage justifying the grant of an injunction, and reversing 108 F. 2d. 897. Cf. *Watson, Atty. Gen.* v. *Buck*, 313 U. S. 387.

Shortly after the decision in *Pullman Co.* case, the Supreme Court faced again the problem in *Chicago* v. *Fieldcrest Dairies, Inc.*, 316 U. S. 168, decided April 27, 1942. There the city of Chicago passed an ordinance requiring that milk products in quantities less than one gallon be sold in "standard milk bottles." The Fieldcrest Dairies,

a foreign corporation authorized to do business in Illinois as wholesalers and retailers of milk, sought a permit from the Board of Health to sell milk in paper containers, and the permit was denied. The corporation then filed a suit in the Federal district court for a declaratory judgment that the ordinance be construed so as not to prohibit it from using paper containers; that its containers were "standard milk bottles" within the meaning of the ordinance; or in the alternative, that if the ordinance be construed as prohibiting the use by the corporation of its paper containers, the ordinance was unconstitutional and void.

The case was referred to a Master who as in this case held extended hearings and submitted a report that the paper containers were not "standard milk bottles" within the meaning of the ordinance, holding the ordinance valid. The District Court later on set aside the Master's findings, and held that the containers were "standard milk bottles," and that under a state statute (Milk Pasteurization Plan Law) the city was without power to prohibit the use of such containers. An injunction was granted accordingly restraining the city from interfering with the corporation in the sale and delivery of milk products in those containers.

On appeal, the then Circuit Court of Appeals reversed the finding that the paper containers were "standard milk bottles", but the appellate court concluded that as the ordinance prohibited, rather than "regulated" the use of paper containers, it was invalid in view of the State act, and intimated further that if the ordinance was construed to prohibit the use of the corporation's containers, it would be void as an unconstitutional exercise of the police power (122 F. 2d. 132). While the case was pending in the District Court, an action in the Illinois Court was instituted raising substantially the same issues and seeking substantially the same relief.

Speaking for the Court, Justice Douglas said that certiorari was granted "because of the doubtful propriety of the District Court and of the Circuit Court of Appeals undertaking to decide such an important question of Illinois law instead of remitting the parties to the state courts for litigation of the state question involved in the case. *Railroad Commission* v. *Pullman Co.,* 312 U. S. 496."

The Supreme Court held that a sound discretion called for a remission of the parties to the state courts, which constitute the more "appropriate forum" for the trial of these issues. The court said further that considerations of delay or inconvenience did not justify a different result, in view of the much larger issue as to the appropriate relationship between federal and state authorities.

The judgment of the Circuit Court was vacated and the case remanded to be retained, pending the determination of proceedings in the state court.

In the case at bar, we might say that at present there is no case pending in the Courts of Puerto Rico in which substantially the same issues are raised.

In fact, if there is no such suit in the local courts, it is because of the restriction of the preliminary injunction herein granted. Should the preliminary injunction be vacated, a case might promptly arise. Anyhow, in the Pullman situation there was no case already pending in the state courts, and yet, the Supreme Court directed the District Court to wait "for proceedings to be brought with reasonable promptness."

After the *Chicago* v. *Fieldcrest Inc.* decision, the Supreme Court analysed the situation once more in *Spector Motor Co.* v. *McLaughlin,* 323 U. S. 101, decided December 4, 1944. Here, a Missouri corporation with its principal place of business in Illinois engaged in interstate trucking business. It maintained in Connecticut two leased terminals, but was not authorized by the State of Connecticut to do intrastate trucking, and it did none.

Connecticut, in 1935 passed an Act assessing on every corporation carrying on, or having the right to carry on business within the State, a franchise tax for the privilege of doing business within the State. The State Tax Commissioner found the corporation was subject to the act and assessed the tax against it. The corporation brought suit in the United States District Court for equitable relief on the ground that the tax did not apply to it under the law of 1935, and if it should apply, that the tax then was against the State and Federal Constitutions as violating the Commerce and Due Process Clauses.

The District Court in the first instance held that the tax under the taxing statute, applied only to intrastate commerce, and therefore, the plaintiff corporation was free from assessment.

The Circuit Court of Appeals (2nd) read the statute as applying to "all corporations having activity in Connecticut whether doing or authorized to do intrastate business," or engaged exclusively on interstate transactions.

The Court of Appeals then faced the constitutional question involved, as to whether the tax infringed the Commerce Clause of the Federal Constitution, and after much consideration, held in a divided opinion, that the Commerce Clause was not affected, and upheld the tax. 139 F. 2d. 809.

Adopting the position that if, as the District Court concluded, the statute did not apply at all to this particular corporation, the grave constitutional problem faced by the Court of Appeals had not to be decided, Mr. Justice Frankfurter expressed for the Court that only the Supreme Court of Connecticut might give an authoritative answer as to whether the taxing statute was applicable or not to this corporation. This, he said, should precede consideration of the constitutional issue. Whatever the Federal court might say in this regard, might be "a forecast, rather than a determination", for the Courts of the State had not yet construed the tax.

The Supreme Court vacated the judgment on the same principles of law and policy that inspired the previous cases, and directed the retention of the bill pending determination of proceedings "to be brought with reasonable promptness" in the State Courts.

The judgment was not vacated because this was a tax case and the Federal Courts are prohibited from enjoining the collection of state taxes.

The Supreme Court made it clear that the District Court had jurisdiction despite the Johnson Act (28 U. S. C. §41 (1) (old Title 28)) because of the uncertainty of the adequacy of the Connecticut remedy.

The Spector Motor Case was followed by *American Federation of Labor* v. *Watson, Attorney General,* 327 U. S. 582, decided March 26, 1946.

Florida, in 1944 adopted an amendment to its Constitution providing that the right of persons to work was not to be denied or abridged on account of membership or nonmembership in any labor union or labor organization, although the amendment should not be construed to deny or abridge the right of employees, through a labor organization, to bargain collectively with the employer. A suit was brought in the United States District Court to enjoin the enforcement of the above amendment to the Florida Constitution on the ground that it violated the Contract Clause of Article I, §10 of the Federal Constitution and furthermore, it was in conflict with the National Labor Relations Act and the Norris-La Guardia Act.

Petitioners contended that the constitutional amendment outlawed the "closed-shops"; that there were closed-shop agreements in effect and unexpired, and that said agreements were valuable property rights of the petitioning labor unions.

It was alleged further that the Attorney General of the United States took the position that closed-shop agreements violated the amendment to the State Constitution, that proceedings were going to be instituted to cancel the

corporate franchise of some corporations having closed-shop agreements, and that the Attorney General had threatened petitioners with criminal prosecutions unless they gave up closed-shop contracts. Irreparable damage was alleged in that the threatened action would result in multiplicity of suits and prosecutions; disruption of employment relations, deprivation of the benefits of existing contracts; loss of skilled workers in the business of one of the petitioners, and cessation of collective bargaining relations with consequent disintegration of the unions. A three-judge District Court was convened.

Mr. Justice Douglas, speaking for the Court said: 327 U. S. at page 588.

> "The District Court concluded that it had jurisdiction of the controversy. But without determining whether there was equity in the bill (*Douglas* v. *Jeannette*, 319 U. S. 157, 162-163) or whether, pursuant to the rule of *Railroad Commission* v. *Pullman Co.*, 312 U. S. 496; *Chicago* v. *Fieldcrest Dairies*, 316 U. S. 168; *Spector Motor Co.* v. *McLaughlin*, 323 U. S. 101, the case should be held until an authoritative interpretation of the Florida law by the Florida courts could first be obtained, it proceeded at once to a consideration of the constitutional questions. It held that this Florida law did not violate the First or Fourteenth Amendments nor the Contract Clause of Article I, §10 of the Federal Constitution. It held that it would be time to consider any conflict with the National Labor Relations Act if and when it arose, since that Act and the Florida law did not on their faces appear to be in conflict. It accordingly vacated the temporary restraining order and dismissed the complaint. 60 F. Supp. 1010. The case is here on appeal."

The Court then passed on the question of the jurisdiction of the District Court, concluding that the District Court had jurisdiction as a suit arising under any law regulating commerce, (§24(8)) of the Judicial Code; and finally that the complaint stated a cause of action in equity it being alleged that there was an imminent threat to an entire

system of collective bargaining, "a threat, which, if carried on will have such repercussions on the relationship between capital and labor as to cause irreparable damage."

Despite the above jurisdictional findings, the Supreme Court said that the District Court, in passing on the merits of the controversy, "did not follow the proper course." 327 U. S. 595.

> "The merits involve substantial constitutional issues concerning the meaning of a new provision of the Florida constitution which, so far as we are advised, has never been construed by the Florida courts. Those courts have the final say as to its meaning. When authoritatively construed, it may or may not have the meaning or force which appellees now assume that it has. In absence of an authoritative interpretation, it is impossible to know with certainty what constitutional issues will finally emerge. What would now be written on the constitutional questions might therefore turn out to be an academic and needless dissertation."

As in the other cases, the Supreme Court vacated the judgment of the District Court in spite of the fact that the District Court denied the injunction on the merits and upheld the Florida Constitution, with instructions to retain action pending adjudication in the state courts.

A fine illustration of the ever increasing reluctancy of the Supreme Court to apply the "stripping doctrine" is found in *Douglas* v. *City of Jeannette,* 319 U. S. 157, decided May 3, 1943. The city of Jeannette passed an ordinance prohibiting the solicitation of orders for merchandise without a license from the city, and made the solicitation without a license a criminal offense. The courts of Pennsylvania construed the ordinance to apply to distribution by Jehovah's Witnesses of their religious literature. Some Jehovah's Witnesses had been prosecuted under the ordinance, and there were threatened prosecutions "en masse." Petitioners then brought suit in the United States District Court praying for injunctive relief against future prosecutions at large, alleging that the ordinance as enforced

against them was a violation of their constitutional rights of freedom of speech, freedom of press and freedom of religious worship.

An injunction as prayed for was granted by the District Court on May 2, 1941, finding the ordinance invalid as depriving the petitioners of the rights of freedom of press and religion.

The Court of Appeals sustained the jurisdiction of the District Court, but reversed on the merits holding that the ordinance was not unconstitutional according to the decision of the Supreme Court in *Jones* v. *Opelika,* 316 U. S. 584, decided June 8, 1942, while the appeal was pending.

On appeal to the Supreme Court, it was held that the District Court erred in entertaining jurisdiction in equity and enjoining the enforcement of the ordinance. This conclusion is very significant for, on that same day, the Supreme Court filed its decision in *Murdock* v. *Pennsylvania,* 319 U. S. 105, where *Jones* v. *Opelika* (supra) was reversed and this ordinance was declared unconstitutional and void as applied to the Witnesses.

It would have been quite natural for the Supreme Court to sustain the jurisdiction of the District Court and uphold the injunction in view of its contemporaneous decision in the Murdock case that the ordinance as enforced on the Witnesses was illegal and void.

Deliberately we have gone, in detail, over the facts governing each of the Pullman line of decisions to establish the complete similarity with the situation at bar.

We submit that in the light of all those cases there is nothing in the present case which does not turn on the interpretation of provisions of local law. The General Expropriation Law of 1903 is to be construed on its own terms and in terms of Act 212 of 1942, and vice-versa. Section 10 of Act 212 is to be construed in the light of the terms of a local franchise (plaintiff's franchise) and in the light of other sections of said Act, under proposition. The General Expropriation Law, Act 212 creating the Com-

munications Authority and questions of local governmental policy under certain sections of Act 212 are to be construed and finally the provisions of the General Expropriation Law regarding the assurance of payment of just compensation are construed.

It seems to us sound and wise for this Court, under the rule of conduct set forth by the Supreme Court, not to go into and decide such questions of local law as, for example, what should be the correct interpretation of Act 212 concerning matters of governmental policy as to the "conveniency or inconveniency", "desirability or un-desirability" of a taking, much less, upon so fragile a basis as the statement of a local official.

The Supreme Court of Puerto Rico might give in due course an authoritative interpretation of the law as regards any or all of those so-called fundamental propositions different from the interpretation given in this case. A sound discretion, we submit, calls for the dismissal of the complaint without prejudice to plaintiff's right to litigate its defenses in proceedings before the insular courts.

Point IV.

Apart from the arguments already stated there is another reason why the certiorari prayed for should not be granted. Petitioner bases his request on the allegation that the opinion of the Court of Appeals is in conflict with opinions of Courts of other circuits and in conflict with opinions of this Court (Pet. 12-18). We respectfully submit that such is not the case.

Petitioner states that the sole basis for the opinion of the Court of Appeals is that petitioner could not be forced to surrender its properties without prior notice. We find nothing in the opinion of the Court of Appeals that will sustain this contention. The Court of Appeals does not deny the power to issue an ex parte order of taking. What it states is that if the legality of such an order is challenged the court would have to give petitioner an oppor-

tunity to be heard (R. 707). It also holds that if such an order is granted illegally petitioner could obtain a writ of prohibition from the Supreme Court of Puerto Rico, citing *P. R. Ry. L. & P. Co.* v. *District Court,* 59 P. R. R. 912 (R. 709). This holding is not in conflict with decisions cited by petitioner (pet. 13-14).

In the case of *City of Oakland* v. *United States,* 124 F. 2d. 959 it was held that defendant had had due process of law because although the order of taking had been issued ex parte defendant had had an opportunity to be heard. In the present case the Court of Appeals held that if petitioner challenged the legality of the taking it would have just that same opportunity.

In *Dade County, Fla.* v. *United States,* 142 F. 2d. 230 it was held that an order of taking issued ex parte is not appealable. That question was not involved in the present case.

The holding in *United States* v. *Miller,* 317 U. S. 369 is similar to that in *City of Oakland* v. *United States,* supra, and in *Catlin* v. *United States,* 324 U. S. 229 the situation is similar to that in *Dade County, Fla.* v. *United States,* supra.

Furthermore, petitioner is assuming that an order of taking would be issued even though the declaration showed clearly that the proposed taking would be illegal. The contrary must be assumed. It must be presumed that if the proposed expropriation is as clearly illegal as petitioner says it is, the Expropriation Court would refuse to issue any such order.

CONCLUSION.

We believe we have shown, in Point I of this brief, that the threatened expropriation is in no way illegal. In Point II we believe we have shown that there is no equitable jurisdiction because plaintiff has an adequate remedy in the Insular courts and because there are no irreparable

damages. In Point III we believe we have shown that, even if there is equitable jurisdiction, this is not a case in which the discretionary power to issue an injunction should be exercised. Finally, in Point IV we believe we have shown that this is not a case in which the discretionary power to issue a writ of certiorari should be exercised. Under these circumstances it is respectfully submitted that certiorari should be denied. However, if a writ of certiorari is issued and it is decided that the judgment of the Court of Appeals should be reversed, then it is respectfully submitted that the case should be returned to the District Court to be decided on the merits after defendants have an opportunity to be heard, and the court pass upon, defendants' objections to the Master's Findings and Report.

Respectfully submitted,

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